

**REMARKS**

Applicants respectfully solicit favorable reconsideration.

Claims 17-22 and 45-50, and 52-76 are presented. Amended claim 17 finds support in the specification at page 8, lines 22-24, and in previously submitted claim 51. Claim 51 is canceled. Claim 52 is amended to relate back to claim 17.

The total number of claims has been reduced without introducing new matter and without introducing a new issue.

Applicants courteously traverse the rejection under 35 U.S.C. §103 over the Budd reference. Applicants courteously submit their claims 17-22, 45-50 and 52-76 each defines an unobvious invention over the prior art. Applicants respectfully request the Examiner to reconsider and withdraw the rejection of these claims over the Budd reference.

Applicants submit that the present rejection founders because it applies Budd in a manner consistent with the reference disclosure. As the Court of Customs and Patent Appeals held almost 50 years ago,

We hold, further, that the combination of Jepson with Chinnery et al. is not a proper ground for rejection of the claims here on appeal. *This suggested combination of references would require a substantial reconstruction and redesign of the elements shown in Chinnery et al. as well as a change in the basic principles under which the Chinnery et al. construction was designed to operate.*

*In re Ratti*, 270 F.2d 810, 123 U.S.P.Q. 349 (CCPA 1958) (emphasis added).

The PTO Board of Appeals has similarly reversed rejections:

Reynolds teaches neither partial nor complete orientation of filaments in the film matrix. More importantly however, Reynolds cannot properly be combined with Graham et al. relative to the employment of continuous monofilaments, since to do so would

destroy that on which the invention of Graham et al. is based, namely, the use of very short fibers. We will not sustain this rejection.

*In re Hartmann*, 186 USPQ (BNA) 366 (BOPI 1974).

The Budd reference is replete with an explicit requirement for a sweetness suppressor, and this requirement is emphasized throughout the Budd reference. *See, e.g.*, Budd et al., column 2, lines 11-14, 30, 34-35; column 3, lines 25-34 and line 66 to column 4, line 11; Example I, column 5, line 58; Example II, column 6, lines 19-20; Example III, column 6, lines 39-40; Example IV, column 7, line 1; Example V, column 7, lines 19-20; Claim 1, column 7, lines 35-38; Claim 16, column 8, lines 20-21; Claim 24, column 8, line 64; Claim 30, column 9, lines 24-25; and Claim 36, column 10, lines 16-17.

In contrast, Applicants no requirement for the sweetness suppressor as described in Budd. Applicants' independent claims 17 and 53 therefore recite the second mixture ingredients using the transition consisting essentially of to thereby exclude such unnecessary ingredient, which exclusion is the antithesis of what Budd dictates. (Under recent judicial pronouncements, teaching away signifies unobviousness.) It is courteously submitted that the Budd reference is an inadequate means for rejecting the claims under 35 U.S.C. §103 for the reasons discussed in Applicants' prior response, and such prior traverse is relied upon herein. Applicants additionally note the various inadequacies in Budd that necessitated its combination with secondary references in the prior Office Action, and point out that such inadequacies surely remain since the secondary references have not been applied in the present Office Action.

Moreover, claims 17 and 53 refer to a coating a food product in step (a) with a liquid mixture including toppings. The Budd Example III relied upon in the office action neither discloses Applicants' step (a) nor would it have suggested it to a person of ordinary skill in the art. Budd's Example III refers to spraying potato chips with a warm aqueous solution of 65% sucrose, dusting solid maltodextrin on the coated chips, and only afterwards does Budd state a mixture of particulate toppings was sprinkled onto the binder-treated chips (column 6, lines 43-45).claims 17 and 53 relate to coating the food product with a liquid mixture that consists essentially of the recited ingredients.

In addition, the Budd reference does not describe Applicants' step of coating the coated food product obtained in step (a) in a second step with a second liquid mixture consisting essentially of 5 to 40 wt.% of a binder selected from the group consisting of maltodextrins having a dextrin equivalent in the range of 0.1 to 10, dextrin, edible polymers, arabic gum, guar gum and cellulose derivatives; 5 to 40 wt.% of a co-binder selected from the group consisting of monosaccharides, disaccharides, and mixtures thereof; and 20 to 90 wt.% water.

Contrary to claims 17 and 53, Budd's Example III – relied upon in the Office Action, discloses a warm solution of 65% sucrose (column 6, line 38), presumably because “[u]sing a high percentage of sugar in the binder keeps water activity low and helps prevent water migration into the snack food base, preventing undesired structure and texture changes prior to drying” (column 3, lines 48-51). A similar high percentage of sucrose is in Budd's Example IV (column 6, line 68). A still higher percentage is in Budd's Example V (column 7, line 18). It is even in Budd's Example I (column 5, line 62).

Budd's focus of a water activity – see even Budd's claim 1 - relates directly to the high sugar content: “[t]he high sugar content of the present binder composition ( Column 2, lines 38-39) … [means] the binder compositions … exhibit relatively low water activity ( $A_w$ ) due to their high sugar content” (column 2, lines 40-42). (Budd refers to an  $A_w$  range of about 0.65 to 0.9, and specific viscosity, but provides no disclosure how those characteristics are achieved.) Budd summarizes his approach as preferably the binder compositions are concentrated solutions of one or more sugars in water (column 2, lines 32-34). This runs counter to Applicants' claims 17 and 53.

Budd refers to their “binder compositions” as possessing “the above-noted advantages of sugar-based compositions” but they are “not sweet tasting” (column 3, lines 4-6) due to the sweetness suppressing agent (e.g., Lactisole ® sweetness suppressor).

Applicants mixture in step (b) therefore unobviously differs from Budd's emphasis on a high percentage of sugar.

Further, in the Budd reference discloses an additional step of dusting maltodextrin solids on a binder-coated product (Example III, column 6, lines 41-42), which is not the process step of coating with a liquid mixture as defined in claims 17 and 53.

Finally, Applicants respectfully submit that the Office Action is wide of the mark when it refers to unexpected results. Aside from Budd teaching away from the claimed inventions for the reasons discussed above plus the reasons discussed in Applicants' prior submissions, the statute itself does not require unexpected results. “The statutory requirements for patentability, broadly stated, are novelty, usefulness and unobviousness, as provided in 35 U.S.C. sections 101, 102, and 103. While it is true that proof that an

invention *is* better or *does* possess advantages may be persuasive of the existence of any one or all of the foregoing three requirements, and hence be indicative of patentability, Congress has not seen fit to make such proof a prerequisite to patentability.” *In re Ratti, supra* (emphasis added).

Nonetheless, Applicants discovered a way to produce food products with toppings of large size, without requiring a high concentration of sugar in a binder solution, without requiring a sweetness suppresser, in which the methodology differs unobviously from the closest example in Budd.

Applicants respectfully request favorable reconsideration followed by Notice of Allowance. If the Examiner has any questions, please contact Applicants' legal representative.

Respectfully submitted,

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